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Attorneys for BRIAN WAYNE WENDT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA,

Plaintiff.

vs.

JONATHAN JOSEPH NELSON, et al.,

Defendants.

Case No. CR-17-00533-EMC

**DECLARATION OF COUNSEL IN
SUPPORT OF MOTION FOR
PERMISSION TO FILE OVERSIZED
MEMORANDUM IN SUPPORT OF
WENDT DEFENSE MOTION TO
EXCLUDE OPINION TESTIMONY
FROM FBI OR OTHER EXPERTS
TESTIFYING ABOUT CELL PHONE
COMMUNICATIONS [CRIMINAL
LOCAL RULES 47-1; 47-2; CIVIL
LOCAL RULES, RULE 7-4(b)]**

**Dept: The Honorable Edward M. Chen,
District Judge**

I, John T. Philipsborn, declare that:

1. Martín Sabelli and I have been appointed to represent Mr. Wendt in the above-captioned matter.

2. As a result of discussions that I have had with colleagues in this case, including many of the defense lawyers for Mr. Wendt's codefendants, I prepared, and Mr. Sabelli reviewed and added to, an extensive memorandum of points and authorities

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1 supporting defense motions to exclude the testimony of FBI Special Agent Sparano, who
2 is being offered to testify about cell phone communications in this case – especially
3 communications around the allegations focused on the killing of Mr. Silva on July 15,
4 2014.

5 3. There have been a few Circuit Court rulings and a relatively large number
6 of District Court rulings from a variety of courts addressing various aspects of the
7 admissibility of cell phone related evidence in criminal cases. A few of these rulings deal
8 with at least some of the specific mapping software used in this case. Various judges
9 have crafted orders addressing differing aspects of the foundation for the admission of
10 cellular phone analysis testimony. Varying limitations have been placed on the evidence.

11 4. Mr. Sabelli and I have made considerable effort to review most of the
12 reported and unreported rulings dealing with ESPA mapping software. We have also
13 sought to address many issues that arise when the kind of testimony that is proposed by
14 the Government here is sought to be introduced in a case like this one. Rather than raise
15 narrow sets of objections, as has occurred in some cases, leaving the accused to have to
16 explain the objections they did not make at the trial level during the appellate process, we
17 have sought to be inclusive in the array of arguments that we have raised in this pleading.

18 5. I fully realize that the pleading in this case is longer than is permitted in the
19 absence of a court order. However, this pleading encompasses objections that have been
20 agreed to by a number of defense counsel, and for that reason, permitting the defense to
21 file this oversize pleading will, in effect, reduce the number of singular objections that
22 otherwise would be raised by individual defenses.

23 6. I believe that there are compelling issues for this Court to address in
24 connection with the Government's proposed cell phone evidence. I believe that under the
25 circumstances, given the collegial work that has gone into the preparation of this set of
26 pleadings, the Court should permit an oversize brief to be filed.

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1 I declare under penalty of perjury that the foregoing is true and correct, except as
2 to those matters alleged on information and belief, and as to those matters I believe this
3 declaration to be true and accurate.

4 Executed this 29th day of January, 2021, at San Francisco, California.

5 /s/ John T. Philipsborn

6 Declarant

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PROOF OF SERVICE

I, Melissa Stern, declare:

That I am over the age of 18, employed in the County of San Francisco, California, and not a party to the within action; my business address is Suite 350, 507 Polk Street, San Francisco, California 94102.

On today's date, I served the within document entitled:

**DECLARATION OF COUNSEL IN SUPPORT OF MOTION FOR
PERMISSION TO FILE OVERSIZED MEMORANDUM IN SUPPORT OF
WENDT DEFENSE MOTION TO EXCLUDE OPINION TESTIMONY
FROM ENTERPRISE EXPERTS [CRIMINAL LOCAL RULES 47-1; 47-2;
CIVIL LOCAL RULES, RULE 7-4(b)]**

- () By placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Mail at San Francisco, CA, addressed as set forth below;
 - (X) By electronically transmitting a true copy thereof through the Court's ECF system;
 - () By having a messenger personally deliver a true copy thereof to the person and/or office of the person at the address set forth below.

AUSA Kevin Barry
AUSA Ajay Krishnamurthy
AUSA Lina Peng

All defense counsel through ECF

Executed this January 29, 2021, at San Francisco, California.

Signed: /s/ *Melissa Stern*
Melissa Stern

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